

Memorandum 84-29

Subject: Study L-640 - Trusts (Judicial Administration)

Background

Over the last 15 years California law concerning judicial administration of trusts has undergone significant changes. Before 1971 the probate court retained jurisdiction over testamentary trusts. It was difficult, however, for a trustee to obtain judicial assistance in administration of an inter vivos trust, such as by seeking instructions or settlement of interim accounts. See Wile, Judicial Assistance in the Administration of California Trusts, 14 Stan. L. Rev. 231, 239-43 (1962). The relief that was available could only be sought by an independent civil action. The problem of judicial administration of inter vivos trusts was remedied beginning in 1971 when the superior court was given jurisdiction over nontestamentary written voluntary express trusts. Prob. Code § 1138.

The next step came when Probate Code Section 1120 was amended to provide that after July 1, 1977, testamentary trusts were not subject to the continuing jurisdiction of the court. By this change, testamentary and inter vivos trusts were put on the same footing, with the courts available upon petition for instructions, to settle accounts, or a number of other matters. See Prob. Code §§ 1120-1126 (supervised testamentary trusts), 1138.1 (inter vivos trusts and unsupervised testamentary trusts).

Finally, during the last two legislative sessions, there has been an effort to remove trusts predating the 1977 amendment of Section 1120 from the continuing supervision of the probate court. See Prob. Code § 1120.1a, as added by 1982 Cal. Stats. ch. 1199, § 2, and as amended by 1983 Cal. Stats. ch. 137, § 1. As Section 1120.1a now stands, institutional trustees are required to follow a procedure for removing pre-1977 testamentary trusts from the "necessity for mandatory court supervision"; individual trustees may, but are not required to, remove the trust from supervision with approval of the probate court. Removal does not relieve the trustee of the duty to account annually and the probate court retains jurisdiction of petitions under Section 1138.1, although the court where the principal place of administration of the trust is located also has jurisdiction. Prob. Code §§ 1120.1a(b), (c), 1138.3.

When the Commission considered this subject in 1983 it affirmed the policies of eliminating procedural distinctions between testamentary and inter vivos trusts and of providing a unified scheme for judicial involvement in trust administration. In light of the experience with Section 1120.1a, this general goal may have to accommodate some special rules for certain pre-1977 testamentary trusts.

Draft Statute

The staff draft of judicial administration provisions generally would continue existing law relating to inter vivos trusts and non-supervised testamentary trusts. The staff draft is attached as Exhibit 1 (draft Sections 4600-4636). A copy of existing judicial administration provisions with comments showing the disposition of existing law is attached as Exhibit 3.

The draft statute and its comments are largely self-explanatory. You will note that several provisions have been drawn from the trust administration provisions of the Uniform Probate Code. For your convenience, a copy of this part of the UPC is attached to this memorandum as Exhibit 4. It should also be noted that the staff draft incorporates Commission decisions made in 1983.

The following issues should be considered:

Draft § 4601. Jurisdiction

This provision on jurisdiction is drawn from UPC Sections 7-201(a) and 7-204. The meaning of "internal affairs of trusts" as used in draft Section 4601(a) is fleshed out in the statement of grounds for a petition in draft Section 4630(b). This comprehensive scheme would replace a sketchy and unclear situation under existing California law. For example, Probate Code Section 1123.7 provides that the probate court has exclusive jurisdiction over proceedings to remove a trustee of a supervised testamentary trust. The procedure for determining questions arising in administration of inter vivos trusts and nonsupervised testamentary trusts is placed in the superior court under Probate Code Sections 1138.1 and 1138.3. However, the remedies provided are "cumulative and nonexclusive"; whether this has any effect on the exclusivity of jurisdiction is unknown.

Although California does not have a separate probate court system, it was held in Copley v. Copley, 80 Cal. App.3d 97, 145 Cal. Rptr. 437 (1978), that the superior court was exercising its limited probate court

jurisdiction and not its general jurisdiction, when jurisdiction was invoked under Probate Code Sections 1138-1138.14. In Copley the court was found to lack jurisdiction to determine the beneficiaries' allegation of fraud or to rescind a sale of stock and determine damages. This conclusion was made in the face of Probate Code Section 1138.2 which empowers the court to make "all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition." The grant of concurrent jurisdiction in draft Section 4601(b) should avoid the Copley limitation by making clear that the court also has power to consider matters other than internal trust affairs. The new Texas Trust Code has also drawn on the UPC jurisdiction provisions. See Tex. Trust Code § 115.001.

Draft § 4602. Venue

At the urging of the State Bar Estate Planning, Trust, and Probate Law Section Executive Committee, the draft was revised upon Commission consideration in 1983 to provide dual venue in the case of testamentary trusts. The staff appreciates the benefit of locating venue in the probate court (as long as the power of the court to determine all relevant issues is not limited) during administration of an estate. However, we do not think it follows from this that venue should remain in the probate court after probate of the estate is concluded or the trust assets are distributed to the trustee, particularly in a case where the principal place of administration of the trust and the beneficiaries are located elsewhere. The dual venue provision may be unobjectionable, however, because the trustee will presumably petition in the county where the principal place of administration of the trust is located. Beneficiaries might be expected to petition in whichever is the most convenient county. On balance, it is best to have a rule pointing to one court at any given time. To allow proceedings in the probate administration court would also be counter to the goal of eliminating procedural distinctions between testamentary trusts on the one hand and inter vivos and pour-over trusts on the other.

Draft § 4603. Jurisdiction over parties

This is a new provision, inspired by UPC Section 7-103(b), that is intended to eliminate some inadequacies in traditional jurisdictional concepts. See UPC § 7-103 comment (copy in Exhibit 4).

Forum non conveniens

The UPC provides a special forum non conveniens rule for trust proceedings in Section 7-203. (See Exhibit 4.) Under this provision, the court is required to refuse to entertain a proceeding concerning a foreign trust unless all appropriate parties can not be bound by litigation in the foreign courts or when the interests of justice would otherwise be seriously impaired. This provision recognizes that one state can determine questions regarding a foreign trust, but provides a useful standard for determining when it is inappropriate. California has a general inconvenient forum statute that calls for a stay or dismissal in the interest of "substantial justice." Code Civ. Proc. § 410.30. The factors to be considered by the court are listed in the Comment to Section 410.30, and include items such as the ability to get personal jurisdiction, the convenience of parties, the difference in conflict of law rules between the alternative forums, and the relationship of the parties and the transaction in dispute to the alternative forums. California law is essentially the same as the UPC rule, but does not enshrine the standard factor relating to authority of the foreign court to bind all appropriate parties. The staff does not think that the stricter UPC standard is preferable to the California statute.

Draft §§ 4610-4618. Notice

These sections of the staff draft provide general notice rules applicable to trust proceedings. These provisions continue existing law but provide additional detail patterned after the guardianship-conservatorship statute, as explained in the comments to the draft sections.

Draft § 4630. Grounds for petition

This section preserves the substance of existing law, as can be seen from the table below, and also adds some elements drawn from the UPC. The approach is to specify as many common elements of the internal affairs of trusts as possible so that there will be no doubt about the power of the court to determine such matters.

At the urging of the State Bar, the authority to determine the existence of a trust was added to draft Section 4630. This is not within the exclusive jurisdiction of the court at the principal place of administration of the trust, however, as provided in draft Section 4601. This is consistent with UPC Section 7-204.

The following table compares California law regarding supervised trusts and nonsupervised trusts and the UPC.

<u>California Law</u>		<u>Uniform Probate Code</u>
<u>Supervised Testamentary Trusts</u> <u>Prob. Code §§ 1120-1126</u>	<u>Nonsupervised Trusts</u> <u>Prob. Code §§ 1138.1, 1138.2</u>	
Determine recipients of property on termination of trust. § 1120(b)	Same. § 1138.1(a)(1)	Ascertain beneficiaries. § 7-201(a)(3)
Settle accounts. § 1120(b)	Same. § 1138.1(a)(2)	Settle interim or final accounts. § 7-201(a)(2)
Pass on acts of trustee. § 1120(b)	Same. § 1138.1(a)(2)	[See general language of § 7-201(a).]
Instruct the trustee. § 1120(b)	Same. § 1138.1(a)(4)	Same. § 7-201(a)(3)
Accept additions to trusts. § 1120(b)	Same. § 1138.1(a)(3)	[See general language of § 7-201(a).]
Grant powers provided in § 1120.2. § 1120(b)	Same. § 1138.1(a)(6)	Determine existence of any power. § 7-201(a)(3)
Amend trust for charitable estate tax deduction. § 1120(b)	Same. § 1138.1(a)(13)	
Submit accounts to beneficiary and remaindermen. § 1121	Same. § 1138.1(a)(5)	[Duty in § 7-303; see general language of § 7-201(a).]
Fix compensation. § 1122	Same. § 1138.1(a)(7)	Review trustee fees. § 7-201(a)(2), 7-205
Appoint trustee. §§ 1125, 1126	Same. § 1138.1(a)(8)	Same. § 7-201(a)(1)
Accept resignation of trustee. § 1125.1	Same. § 1138.1(a)(9)	
Remove trustee. § 1123.5	Same. § 1138.1(a)(10)	Same. § 7-201(a)(1)
Modify trust with low principal. § 1120.6	Same. § 1138.1(a)(12)	
		Review employment of persons by trustee. § 7-205

Draft §§ 4180-4186. Removal of trusts from continuing court supervision

Exhibit 2 contains a staff draft of provisions based on Probate Code Section 1120.1a dealing with testamentary trusts subject to continuing judicial supervision. The staff would like to eliminate mandatory judicial supervision under pre-1977 law, but we are doubtful that this could successfully be accomplished, in view of the experience with Probate Code Section 1120.1a during the last two legislative sessions. We do not see that it is useful to continue automatic accountings that are not required by the trust or by the general duty to keep beneficiaries reasonably informed. In fact, the staff is puzzled about why the complicated procedure of Section 1120.1a was felt to be necessary. The law did not require annual accountings under the supervisory regime, but the transitional Section 1120.1a does require such accountings to beneficiaries. The staff would apply the new procedures to all trusts, whenever created. We sense no significant interest of deceased trustors that necessitates a scheme like that envisioned by Section 1120.1a. In sum, the California "mandatory judicial supervision" scheme was not so intrusive and paternal that a trustor could have placed a great degree of reliance on the court system.

Draft §§ 4000-4003. Miscellaneous general provisions

Exhibit 5 contains four miscellaneous provisions that should be non-controversial.

Trust Registration Under the UPC

The staff assumes that it is unlikely the Commission will want to propose the adoption of a trust registration scheme modeled after the UPC. The following discussion is included here for your information and also in case there is some interest in considering some registration requirements.

The Uniform Probate Code requires trustees to register trusts in the court in the principal place of administration. UPC § 7-101. Unless otherwise designated in the trust instrument, the principal place of administration is "the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business." Id. The trustee is also under a "continuing duty to administer the trust at a place appropriate to the

purposes of the trust and to its sound, efficient management." UPC § 7-305. The court may order a change of place of administration where appropriate, and in doing so may order removal of the trustee and appointment of a trustee in another state. Id.

The concept of trust registration has been described as one of the UPC's most controversial provisions. Averill, A Comparison of the Uniform Probate Code With the Law of Texas--Trust Administration, in Comparative Probate Law Studies 801, 804 (1976). It appears, however, that a certain amount of this controversy has arisen from a misunderstanding of the registration provision. It does not require filing a copy of the trust instrument or registering the terms of the trust. Registration is accomplished, as provided in UPC Section 7-102, by filing a statement including the following: (1) the name and address of the trustee, (2) an acknowledgment of the trusteeship by the trustee, (3) a statement whether the trust has been registered elsewhere, and (4) an identification of the trust. The manner of identifying the trust depends upon the nature of the trust. If it is testamentary, the statement must include the name of the testator and "the date and place of domiciliary probate." If it is a written inter vivos trust, the statement must include the name of each settlor and the original trustee and the date of the trust instrument. If it is an oral trust, the statement must give information identifying the settlor "or other source of funds" and describe "the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance." Hence, only in the case of oral trusts must the terms of the trust be disclosed. The staff considers this to be a desirable provision. There is also a provision permitting the settlor of a revocable trust to exempt the trustee from the registration requirement as long as the power of revocation is retained. See UPC § 1-108. Otherwise, a provision in a trust is not effective to excuse the trustee from the registration requirement. See UPC § 7-104.

Registration results in submitting to the personal jurisdiction of the court in proceedings relating to administration of the trust. UPC § 7-103(a). Beneficiaries given notice pursuant to UPC Section 1-401 are subject to jurisdiction of the court of registration to the extent of their interests in the trust. UPC § 7-103(b). If a trustee fails to register the trust in a proper place, the trustee is still subject to personal jurisdiction of the court in which the trust could

have been registered, in any proceeding initiated by a beneficiary. UPC § 7-104. The settlor or a beneficiary may also give a written demand to the trustee that the trust be registered; if the trustee fails to do so within 30 days after receipt of the demand, the trustee is subject to removal and denial of compensation or to surcharge. UPC § 7-104.

The trust registration scheme serves several purposes. It informs the beneficiaries of the existence of the trust. It provides evidence that the trustee has accepted the trust. It subjects the trustee and beneficiaries to the jurisdiction of an identified court so that any dispute that arise concerning administration of the trust may be litigated with relative ease. While facilitating judicial proceedings initiated by the trustee or beneficiaries, the UPC avoids compulsory, continuing judicial supervision. Uniform Probate Code Section 7-201(b) provides:

Neither registration of a trust nor a proceeding under this section result [sic] in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

The trust registration provisions have not been well received by the states that have considered the UPC. The staff has examined the statutes of 15 states--14 of them "UPC states" and Kentucky, which enacted much of the article on trust administration. Only three states--Alaska, Idaho, and North Dakota--enacted the trust registration scheme with a mandatory duty that is not subject to significant exceptions. Two states--Maine and Nebraska--have made the registration an option by substituting the word "may" where "shall" appears in UPC Section 7-101. Six states omit the registration provisions entirely--Arizona, Florida (which had initially enacted the registration scheme), Minnesota, Montana, New Mexico, and Utah. Four states have registration schemes with a mandatory duty but subject to significant exceptions. Colorado provides for registration as a general rule, but exempts trusts having no asset other than the right to receive property upon the occurrence of some future event, trusts nominally funded (assets valued at \$500 or less), and revocable inter vivos trusts (while revocable). Hawaii requires registration in the principal place of administration or where land held

in trust is located and does not require registration of inter vivos trusts unless required by the settlor (the exception does not apply when the settlor dies). Kentucky similarly provides that there is no duty to register an inter vivos trust unless the settlor so directs. Michigan does not require registration of testamentary trusts or any trust containing terms exempting the trustee from the registration provisions.

The State Bar has opposed the registration concept, labelling it "alien to the policy adopted by the California Legislature in respect to inter vivos trusts in that it prevents the creation of private trusts without public disclosure." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 197 (1973). This criticism glosses over the fact that registration does not involve disclosure of the terms of written inter vivos trusts nor of the trust beneficiaries. It is hard to understand what policy concerning the creation of private trusts without public disclosure is impaired in any significant manner by the UPC registration provisions. If the State Bar was referring to some policy in favor of oral trusts, then some additional support for the statement is needed. In addition, as noted by the Joint Editorial Board of the UPC, the State Bar "does not attempt to relate the alleged 'policy' of the California Legislature to private, testamentary trusts which cannot be created in California without full public disclosure of all of the trust terms and assets--much more than would be required by UPC's registration provisions." Joint Editorial Board of the Uniform Probate Code, *Response of the Joint Editorial Board* 70 (1974). In any event, modifications in the registration scheme like those enacted in some other states could make registration permissive during the life of the settlor of a written inter vivos trust and so avoid the State Bar objection.

California has moved away from continuing judicial supervision of testamentary trusts and at the same time provided for intermittent judicial administration of inter vivos and testamentary trusts upon petition of a trustee, beneficiary, or remainderman. See Prob. Code §§ 1120, 1120.1a, 1138, 1138.1. The State Bar has commented that the "philosophical orientation of Article VII of the UPC is similar to that of the California Probate Code." State Bar, *supra*, at 194. It should be noted, however, that Probate Code Section 1138.13 permits a trust to exempt itself from judicial supervision either expressly or by "necessary implication." The Commission decided not to continue this provision

when it was considered in 1983 because its only effect was to force the complainant to bring a civil action instead of resorting to the statutory proceeding. Probate Code Section 1138.3 gives jurisdiction to the superior court where the principal place of administration of the trust is located. This is the same place where, under UPC Section 7-101, the trust would be required to be registered. (The rules on determining the principal place of administration differ in the case of cotrustees.) Draft Section 4603 in Exhibit 1 grants jurisdiction over trustees who have accepted the trust, without any need to perform an act like registration.

Various alternatives are available within a trust registration system:

1. Adopt the UPC scheme, including mandatory registration of trusts, except revocable trusts which may avoid registration while the power to revoke lasts.

2. Make registration mandatory, subject to certain exceptions where registration would be permissive, such as:

- Trusts with no assets other than right to receive property upon occurrence of future event. (Colorado)
- Trusts nominally funded in an amount such as \$500. (Colorado)
- Inter vivos trusts during the life of the settlor. (Hawaii)
- Inter vivos trusts at any time, unless required by the settlor. (Kentucky)

3. Make registration generally permissive. (Maine, Nebraska)

Registration would make it easier for beneficiaries and remaindermen to know the proper court for initiating proceedings. This benefit must be weighed against the financial burden on government of establishing a registration system and the burden on trustees of routinely requiring registration. Remember, however, that under the UPC the trustee is not subject to any penalty for not registering the trust until 30 days after the trustee receives a written demand for registration. The staff is not persuaded that the benefits of a registration scheme are significant enough to outweigh the real and perceived detriments and so the staff does not recommend adoption of such a scheme in California.

Respectfully submitted,

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Staff Counsel

EXHIBIT 1

Staff Draft

Probate Code §§ 4600-4636

15346

PART 4. JUDICIAL ADMINISTRATION OF TRUSTS

CHAPTER 1. COURT JURISDICTION OVER TRUSTS

Article 1. Jurisdiction and Venue

§ 4600. Principal place of administration of trust

4600. (a) If a trust has a single trustee, the principal place of administration of the trust is the trustee's usual place of business where the day-to-day records pertaining to the trust are kept or, if none, the trustee's residence.

(b) If the trust has more than one trustee, the principal place of administration of the trust is the usual place of business where the day-to-day records pertaining to the trust are kept or, if none, the usual place of business or residence of any of the cotrustees as agreed upon by them or, if none, the residence or place of business of any of the cotrustees.

Comment. Section 4600 continues the substance of the second and third sentences of former Section 1138.3(a).

4996

§ 4601. Jurisdiction

4601. (a) The superior court has exclusive jurisdiction of proceedings concerning the internal affairs of trusts as provided in this chapter.

(b) The superior court has concurrent jurisdiction of the following:

(1) Actions and proceedings to determine the existence of trusts.

(2) Actions and proceedings by or against creditors or debtors of trusts.

(3) Other actions and proceedings involving trustees and third persons.

Comment. Section 4601 is new. Subdivision (a) provides for exclusive jurisdiction in the superior court in matters involving the internal affairs of trusts. See Article 3 (commencing with Section 4630). Jurisdiction was in the superior court under former Section 1138.3.

Subdivision (a) also supersedes former Section 1123.7. Subdivision (a) is drawn from the first sentence of Uniform Probate Code Section 7-201(a).

Subdivision (b) is new and is drawn from Uniform Probate Code Section 7-204.

405/979

§ 4602. Venue

4602. (a) The proper county for commencement of a proceeding pursuant to this chapter is the county in which is located the principal place of administration of the trust.

(b) In the case of a testamentary trust, the proper county for commencement of a proceeding pursuant to this chapter is either the county described in subdivision (a) or the county where the estate is administered.

(c) In other cases, venue is determined by the rules applicable to civil actions generally.

Comment. Subdivision (a) of Section 4602 continues the substance of part of the first sentence of former Section 1138.3(a). See Sections 4600 (principal place of administration of trust), 4601(a) (jurisdiction in superior court).

Subdivision (b) continues the substance of former Section 1138.3(b) and extends the former provision to all testamentary trusts. Subdivision (b) also supersedes the part of former Section 1120(b) relating to jurisdiction over testamentary trusts.

Subdivision (c) provides venue rules applicable in cases described in Section 4601(b). This subdivision is drawn from Uniform Probate Code Section 7-204.

405/978

§ 4603. Jurisdiction over parties

4603. (a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this chapter, provided that notice is given the trustee in the manner required by law.

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this chapter, provided that notice is given the beneficiary in the manner required by law.

Comment. Section 4603 is a new provision that is intended to facilitate the exercise of the court's power under this chapter. This section is drawn from Uniform Probate Code Section 7-103.

Article 2. Notice§ 4610. Application of article

4610. This article applies to notice in proceedings commenced pursuant to this division.

Comment. Section 4610 supersedes former Section 1215. See also Section 82 ("trust" defined). This article governs notice in proceedings under Article 3 (commencing with Section 4630) and also to proceedings for removal of a trust from continuing supervision under Sections 4180-4186.

405/000

§ 4611. Form of notice

4611. If notice of the time and place of a hearing is required to be given by this division, the notice shall be in the form prescribed by the Judicial Council or, if the Judicial Council has not prescribed an applicable form, in compliance with Section 1200.1.

Comment. Section 4611 is drawn from Section 1464 (form of notice under guardianship-conservatorship statute). See also Section 4000 (Judicial Council may prescribe forms required by division).

405/001

§ 4612. Manner of mailing; when mailing complete

4612. (a) Unless otherwise expressly provided by statute, if a notice or other paper is required or permitted to be mailed to a person pursuant to this division, it shall be sent by:

(1) First-class mail if the person's address is within the United States.

(2) Airmail if the person's address is not within the United States.

(b) Mailing is complete under this division when the notice or other paper is deposited in the mail, postage prepaid, addressed to the person to whom it is mailed.

(c) If the address is not known, notice shall be given as the court may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

Comment. Subdivisions (a) and (b) of Section 4612 are new and are the same as Section 1465. Subdivision (c) continues the substance of part of the second paragraph of subdivision (a) of former Section 1138.6.

§ 4613. Personal delivery instead of mailing

4613. If a notice or other paper is required or permitted to be mailed pursuant to this division (whether by first-class, airmail, certified, or registered mail), it may be delivered personally to the person to whom it is required or permitted to be mailed. Personal delivery as provided in this section is deemed to satisfy the provision that requires or permits the notice or other paper to be mailed.

Comment. Section 4613 is the same as Section 1466 and continues the substance of the fourth paragraph of subdivision (a) of former Section 1138.6.

405/003

§ 4614. Proof of giving notice

4614. (a) Proof of the giving of notice under this division shall be made at or before the hearing to the satisfaction of the court. Proof may be made by, but is not limited to, the following means:

(1) Proof of notice by personal delivery may be made by the affidavit of the person making the delivery showing the time and place of delivery and the name of the person to whom delivery was made.

(2) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

(3) Proof of posting may be made by the affidavit of the person who posted the notice.

(4) Proof of publication may be made by the affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication.

(5) Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

(b) If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order. When the order becomes final, it is conclusive on all persons.

Comment. Section 4614 is the same as Section 1468 (proof of notice under guardianship-conservatorship statute). Section 4614 supersedes the fifth paragraph of subdivision (a) of former Section 1138.6. This section also supersedes former Section 1123, and subdivision (c) of Section 1200.5 to the extent it applied to proceedings involving trusts.

§ 4615 Additional notice

4615. (a) The court may, on its own motion or on request of a trustee or other person interested in a trust, require that further or additional notice be given at any stage of the proceeding. The court may prescribe the form and method of the notice to be given.

(b) A petitioner or other person required to give notice may cause notice to be given to any person interested in the trust without the need for a court order.

Comment. Subdivision (a) of Section 4615 continues the substance of subdivision (a)(1) and subdivision (b) of former Section 1215.3. Section 4615 is comparable to Sections 1204 and 1462.

Subdivision (b) continues the substance of the second sentence of former Section 1215.4.

405/187

§ 4616. Shortening time

4616. The court may for good cause shorten the time for giving any notice required by this division.

Comment. Section 4616 is new and is drawn from subdivision (a) of Section 1462.

405/190

§ 4617. Notice of postponed hearings

4617. The court may continue or postpone any hearing, from time to time, in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.

Comment. Section 4617 is the same as Sections 1205 and 1463.

405/191

§ 4618. Notice in cases involving future interests

4618. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to the trust beneficiaries, [to persons interested in the trust, or to beneficiaries or remaindermen including all persons in being who shall or may participate in the principal or income of the trust,] if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Except as otherwise provided in subdivision (b), where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is given and a person to whom notice is not required to be given under subdivision (a), notice shall be given to persons otherwise not entitled to notice under subdivision (a).

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Requirements for appointment of a guardian ad litem pursuant to Section 4002.

Comment. Subdivision (a) of Section 4618 continues the substance of former Section 1215.1. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 4181 (transitional provisions concerning certain testamentary trusts), 4633 (notice of hearing on petitions generally), 4654-4655 (notice of petition for transfer to another jurisdiction), 4675-4676 (notice of petition for transfer to California).

Subdivision (b) continues the substance of former Section 1215.2. Subdivision (c) continues the substance of the first sentence of former Section 1215.4.

Note. Some or all of the language in brackets in subdivision (a) may be unnecessary, depending on language used in other parts of the statute. The reference in subdivision (c)(1) to request for special notice would pick up the procedure applicable to probate proceedings (see Prob. Code §§ 1202-1203). There is no parallel procedure applicable to inter vivos trusts.

Article 3. Proceedings Concerning Trusts

§ 4630. Petitioners; grounds for petition

4630. (a) A trustee, beneficiary, or other interested person may petition the court under this article concerning the internal affairs of a trust or to determine the existence of a trust.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

(1) Determining questions of construction of a trust instrument.

(2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

(3) Determining the validity of a trust provision.

(4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.

(5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.

(6) Instructing the trustee.

(7) Compelling the trustee to submit accounts and report acts as trustee to a beneficiary.

(8) Granting powers to the trustee.

(9) Fixing, directing, or allowing payment of the trustee's compensation.

(10) Appointing or removing a trustee.

(11) Accepting the resignation of a trustee.

(12) Directing the relief provided in Section 4242 in the case of a trust with uneconomically low principal.

(13) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(14) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

Comment. Section 4630 generally continues the substance of subdivision (a) of former Section 1138.1 and supersedes parts of former Section 1120. The reference to determining the existence of a trust in subdivision (a) is new.

Paragraphs (1) and (2) of subdivision (b) are new and are drawn from Uniform Probate Code Section 7-201(a). Paragraph (3) is new. Paragraph (5) continues the substance of parts of subdivisions (b) and (d) of former Civil Code Section 2269 (review of exercise of discretionary powers). See Sections 4350-4352 (duties in exercise of discretionary powers). Paragraph (9) supersedes the last sentence of former Civil Code Section 2274.

Various provisions elsewhere in this division relate to proceedings under this article. As to compelling the trustee to account under paragraph (7), see Sections 4340-4341. As to granting powers to the trustee under paragraph (8), see Section 4401. As to the trustee's compensation under paragraph (9), see Sections 4500-4501. As to authorizing transfers of trusts under paragraph (14), see Sections 4650-4679.

See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 4602(a) (venue).

405/946

§ 4631. Commencement of proceeding

4631. A proceeding under this article is commenced by filing a verified petition stating facts showing that the petition is authorized under this article.

Comment. Section 4631 continues the substance of the first sentence of former Section 1138.4, except for the provision relating to authorization by the terms of the trust.

405/948

§ 4632. Dismissal of petition

4632. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the petitioner.

Comment. Section 4632 continues the substance of former Section 1138.5(a). See also Section 4620(a) (who may petition).

405/949

§ 4633. Notice

4633. (a) At least [30] days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of hearing to be mailed to any of the following persons who are not petitioners:

(1) All trustees.

(2) Except as provided in Section 4618, all trust beneficiaries, including all persons in being who may participate in the principal or income of the trust.

(b) If a trustee who is not petitioning or a beneficiary, in person or by counsel, has served and filed a notice of appearance directed to the petitioner or the petitioner's counsel in connection with the proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be sent or delivered, the petitioner shall cause a copy of the petition to be mailed to that person within five days after service of notice of appearance or receipt of the request.

(c) Notice of any petition filed on the grounds specified in paragraph (13) of subdivision (b) of Section 4630 or to modify or terminate a charitable trust subject to supervision under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code shall be given to the Attorney General.

Comment. Subdivision (a) of Section 4633 continues the substance of the second paragraph of subdivision (a) of former Section 1138.6. [The time for giving notice has been reduced from 30 days to ___ days.] See also Sections 4610-4618 (manner of notice). Subdivision (b) continues the substance of the third paragraph of subdivision (a) of former Section 1138.6. Subdivision (c) continues the substance of subdivision (d) of former Section 1138.6, and also reflects the notice requirement provided in Government Code Section 12591. See also Section 24 ("beneficiary" defined).

Note. Subdivision (c) might be more useful if it required notice to the Attorney General in any proceeding involving a charitable trust or a charitable disposition.

405/951

§ 4634. Orders and decrees

4634. The court in its discretion may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition.

Comment. Section 4634 continues the substance of former Section 1138.2 and part of former Section 1121.

405/959

§ 4635. Appeal

4635. An appeal may be taken from any of the following orders or from the refusal to make any of the following orders:

- (a) Determining the existence of a trust.
- (b) Determining questions of construction of trust instruments.
- (c) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

- (d) Determining the validity of a trust provision.
- (e) Ascertaining beneficiaries and determining to whom property shall pass.
- (f) Settling the accounts and passing upon the acts of the trustee.
- (g) Instructing the trustee.
- (h) Granting powers to the trustee.
- (i) Fixing, directing, or allowing payment of compensation.
- (j) Appointing or removing a trustee.
- (k) Authorizing or directing transfer of a trust or trust property to another jurisdiction.
- (l) Dismissing a petition under this article.

Comment. Section 4635 continues the substance of former Section 1138.10 and parts of Section 1240. Subdivisions (a)-(d) are new and relect new material in Section 4630. See Sections 4630 (grounds for petition under this article), 4632 (dismissal of petition).

405/960

§ 4636. Cumulative remedies

4636. The remedies provided in this article are cumulative and nonexclusive.

Comment. Section 4636 continues former Section 1138.11. This section recognizes that an interested person may bring an action rather than commence a proceeding under this article.

Note. The remainder of this part consists of Chapter 2 (transfer of trust to another jurisdiction) and Chapter 3 (transfer of trust to California). See Memorandum 84-30.

EXHIBIT 2

Staff Draft

Probate Code §§ 4180-4186

CHAPTER 4. TRANSITIONAL PROVISIONS

405/335

Article 2. Removal of Trusts From Continuing
Court Supervision

§ 4180. Application of article

4180. This article applies only to testamentary trusts created by a will executed before July 1, 1977, and not republished thereafter.

Comment. Section 4180 continues the substance of the first sentence of former Section 1120.1a.

405/348

§ 4181. Notice to beneficiaries

4181. (a) Except as provided in Section 4182, within six months after the initial funding of the trust, the trustee of a trust described in Section 4180 shall give a notice of removal of trusts from continuing supervision to each beneficiary, including all persons in being who shall or may participate in the principal or income of the trust. Notice shall be sent by registered or certified mail or by first class mail to the persons to be notified at their last known addresses. Notice may be sent by first class mail only if an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee.

(b) The notice of removal of trusts from continuing supervision shall contain the following:

(1) A statement that as of January 1, 1983, the Probate Code was amended to remove the necessity for mandatory court supervision of the trust.

(2) A statement that, unless the terms of the trust limit or eliminate such authority, Section 4630 of the Probate Code gives any beneficiary the right to petition a court to determine important matters relating to the administration of the trust.

(3) A copy of the text of Sections 4630 and 4631.

(4) A statement that each income beneficiary, as defined in subdivision (a) of Section 4802, is entitled to an annual statement of the principal and income receipts and disbursements of the trust and that any other beneficiary is entitled to such information upon written request to the trustee.

(5) A statement that the beneficiary is entitled to petition a court to settle the accounts and pass upon the acts of the trustee.

(6) The name and location of the superior court in the county in which it is appropriate to file a petition pursuant to Section 4630, the name and location of the superior court that had jurisdiction over the administration of the estate pursuant to Section 301, and a statement that it is appropriate to file a petition pursuant to Section 4630 with either court.

(c) The trustee shall file with the court that had jurisdiction over the administration of the estate pursuant to Section 301 proof of service of the notice under this section within seven months after the initial funding of the trust.

Comment. Section 4181 continues the substance of subdivision (a) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

Note. Draft Sections 4630 and 4631 are in Exhibit 1. Draft Section 4802 is attached to Memorandum 84-32.

405/374

§ 4182. Court approval to remove trust from continuing jurisdiction

4182. (a) Notwithstanding Section 4181, with respect to a trust where no trustee is a trust company, as defined in Section 107 of the Financial Code, the trustee may remove the trust from the continuing jurisdiction of the superior court only with approval of the court. The trustee may seek court approval pursuant to this section at any time, and from time to time, in the trustee's discretion.

(b) To obtain the court's approval, the trustee shall file a verified petition with the clerk setting forth the trust accounts in detail, reporting his or her acts as trustee, showing the condition of the trust estate, and attaching a true copy of the trust instrument.

(c) Notice of the hearing shall be given, along with a copy of the petition, at least [30] days before the hearing to all persons entitled to receive notice pursuant to Section 4181.

(d) At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or may grant the petition, upon such conditions as the court in its discretion deems proper.

(e) If the petition is granted, the trustee shall send the notice and proof of service required by Section 4181 within six months and seven months, respectively, from the date the petition is granted. A copy of the court order granting the petition shall be attached to such notice.

(f) If the petition is not granted, the trust shall continue to be administered under subdivisions (b) and (c) of former Section 1120 as if the testator had provided in the will that the superior court shall not lose jurisdiction of the estate by final distribution.

Comment. Section 4182 continues the substance of subdivision (d) of former Section 1120.1a. See also Section 4001 (clerk to set matters for hearing).

405/384

§ 4183. Notice to minor, ward, or conservatee

4183. (a) If a beneficiary is a minor, ward, or conservatee, any notice, statement, or summary required to be sent to the beneficiary by this article shall be sent to the parent, guardian, or conservator, as the case may be.

(b) In addition to the requirements of subdivision (a), if the trustee, at the time the notice required by Section 4181 is sent, has actual knowledge that a beneficiary who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by Section 4181 to both that person and the beneficiary and, upon the written request of either of them, shall also send the statement required by Section 4341 to both of them.

Comment. Section 4183 continues the substance of subdivision (e) of former Section 1120.1a. The contents of the accounting required by Section 4341 differs from that required by subdivisions (b) and (c) of former Probate Code § 1120.1a. See also Section 24 ("beneficiary" defined).

Note. Draft Section 4341 is attached to Memorandum 84-21.

405/385

§ 4184. Application of article to charitable trusts

4184. (a) If the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, upon the vesting of any charitable

interest created by the trust, the trustee shall thereafter furnish to the statement required by Section 4341 without the necessity of any written request.

(b) A charitable interest is deemed to be vested within the meaning of subdivision (a) as of the time when it is first ascertainable that income or principal is, or in the future will be, paid to a charity or applied for a charitable purpose.

(c) Notwithstanding any other provisions of law, the Attorney General may petition the court to settle the account and pass upon the acts of the trustee as provided in Section 4630.

Comment. Section 4184 continues the substance of subdivision (f) of former Section 1120.1a.

Note. Draft Section 4341 is attached to Memorandum 84-21. Draft Section 4630 is in Exhibit 1.

405/341

§ 4185. Removal by trust company as successor trustee

4185. If a trust company, as defined in Section 107 of the Financial Code, is appointed as a successor trustee of a trust which, at the time of the appointment, is subject to the continuing jurisdiction of the court because it was not removed pursuant to Section 4182, the successor trustee shall send the notice and proof of service required by Section 4181 within six months and seven months from the date of appointment, respectively.

Comment. Section 4185 continues the substance of the first sentence of subdivision (g) of former Section 1120.1a.

405/339

§ 4186. Effect of change in trustees or other event on removal

4186. After a trust is no longer subject to the continuing jurisdiction of the court, whether by operation of law or by removal pursuant to Section 4182, neither a change in trustees nor any other event causes the trust to be subject to continuing jurisdiction under former Sections 1120 to 1133, inclusive.

Comment. Section 4186 continues the substance of the second sentence of subdivision (g) of former Section 1120.1a.

EXHIBIT 3

Staff Draft

Disposition of Existing Law on Judicial
Administration of Trusts

Probate Code §§ 1120-1138.14
1215-1215.4

100/888

Probate Code §§ 1120-1139.19 (repealed). Administration of trusts

SEC. ____ Chapter 19 (commencing with Section 1120) of Division 3
of the Probate Code is repealed.

CHAPTER 19. ADMINISTRATION OF TRUSTS

Article 1. Testamentary Trusts

§ 1120 (repealed). Continuing judicial supervision over trusts

(a) A trust created by a will is not subject to the continuing jurisdiction of the superior court, unless the testator provides otherwise. Article 2 (commencing with Section 1138) shall be applicable to the trust to the extent that the will or article does not provide otherwise.

(b) When a trust created by a will continues after distribution, and the testator provides that the superior court shall not lose jurisdiction of the estate by final distribution, the superior court shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that the determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee, of authorizing the trustee to accept additions to the trust from sources other than the estate of the decedent, and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of the trust, or at the termination thereof, render for settlement his or her accounts and report his or her acts as trustee, before the superior court in which the will was probated. For that purpose, the trustee shall present to the court a verified account and report, setting forth the accounts in detail, reporting his or her acts as trustee, and showing the condition of the trust estate. If the trustee dies or becomes incompetent, the account and report shall be presented by the trustee's executor, administrator, guardian, or conservator. In the event the trustee dies or becomes incompetent, and there is no executor, administrator, guardian, or conservator appointed for the trustee's estate, or in the event the trustee absconds, the court may compel the attorney for the deceased, incompetent, or absconding trustee to present the account and report to the extent that the attorney has information or records available for that purpose. The account and report of the attorney need not be verified. A fee shall be allowed to the attorney by the court for this service.

The trustee may also petition such court, from time to time, for instructions as to the administration of the trust for authority to accept additions to the trust from any source or sources other than the estate of the decedent, and for authority to exercise the powers authorized by Section 1120.2 of this code. The court may hear the petition and instruct or authorize the trustee by order rendered before or after any distribution to the trustee. When the trustee files the petition before any distribution of the estate to the trustee, the trustee shall, in addition to any other notice required, cause notice of the hearing to be mailed to the personal representative and shall further cause notice of the hearing to be mailed to all persons, including heirs, legatees, and devisees, at their last known address, to whom the court may order notice to be given, and shall, upon filing the petition and before giving notice thereof, secure from the court an order designating the persons in addition to the personal representative and the beneficiaries to whom the court requires that notice be given, or an order that notice to the personal representative and the beneficiaries is the only notice that shall be required.

When it appears from the allegations of the petition that the trustee seeks instructions to exercise a power not conferred upon the trustee or seeks authority to exercise the powers authorized by Section 1120.2, the petition shall set forth the particulars of and the necessity for the action sought to be taken.

The clerk shall set the hearing upon the account and report or petition for settlement or instructions. The trustee shall cause notice of the hearing to be given to the beneficiaries, including all persons in being who shall or may participate in the corpus or income of the trust, at their last known addresses, as provided in Section 1200.5, whether they have requested special notice or given notice of appearance or not. In addition to the above notice, when the petition relates to the exercise of a power not conferred or seeks authority to exercise the powers authorized by Section 1120.2, a copy of the petition shall be attached to and mailed with copies of the notice which are mailed and the court or judge shall, at least 10 days before the return day, appoint a suitable person who shall appear and act as guardian ad litem of any person or persons of a designated class, who are not ascertained, or who are not in being, and who may become beneficiaries or may so participate in the trust. None of the provisions of Section 373 of the Code of Civil Procedure shall apply to the appointment.

(c) In addition to the provisions of subdivision (b), the personal representative of the decedent's estate, prior to final distribution, or the trustee, beneficiary, or remainderman, before or after final distribution, may petition the superior court to amend or conform the trust provisions of the decedent's will in the manner required to qualify the decedent's estate for the charitable estate tax deduction permitted by federal law. The petition may include a request to add to the trust provisions of the decedent's will the mandatory governing instrument requirements for a charitable remainder trust, as required by final regulations and rulings of the United States Internal Revenue Service. Notice of the petition shall be given to the Attorney General. No amendment or conformation may be ordered by the court without having first received written agreement to the proposed changes or disclaimer of interest from all interested parties in the trust. The execution of an agreement shall not be construed to be a contest under any provisions of the will prohibiting will contests. The existence of a spendthrift or similar protective provision in the trust shall not make this subdivision inapplicable to that trust.

Comment. Former Section 1120 is not continued since trusts are no longer required or permitted to be subject to the continuing jurisdiction of the court, except for certain testamentary trusts created before July 1, 1977. See Sections 4180-4186. Trusts are now subject to the intermittent jurisdiction of the courts when invoked pursuant to Division 4.5 (commencing with Section 4000). See, e.g., Section 4630 (grounds for petition). The new law, however, contains provisions comparable to parts of former Section 1120 and other sections in former Article 1. See Sections 4601 (jurisdiction in superior court), 4630(b)(5) (petition to settle accounts), 4630(b)(6) (petition for instructions), 4630(b)(13) (amending trust for charitable estate tax deduction), 4633 (notice of hearing on petition), 4420-4482 (trustees' powers), 4001 (clerk to set petition for hearing), 4070-4078 (notice), 4002 (appointment of guardian ad litem).

§ 1120.1 (repealed). Additions to trust subject to jurisdiction of court

Whenever a trustee receives additions to the trust in accordance with a decree rendered pursuant to Section 1120 of this code, such additions shall be subject to the jurisdiction of the court in the same respects as property received by the trustee from the decedent's estate.

Comment. Former Section 1120.1 is superseded by Section 82 ("trust" defined to include additions to trust).

§ 1120.1a (repealed). Removal of trusts from continuing court supervision

This section shall apply only to trusts which were created by a will executed before July 1, 1977, and not republished thereafter.

(a) Except as provided in subdivision (d), the trustee of such a trust shall give notice on or before July 1, 1983, or within six months after the initial funding of the trust, whichever occurs later, to each beneficiary, including all persons in being who shall or may participate in the corpus or income of the trust, at their last known addresses. Notice shall be given by registered or certified mail or, in the alternative, by first-class mail on the condition that an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee. The notice shall contain the following information:

(1) A statement that as of January 1, 1983, Section 1120 of the Probate Code was amended to remove the necessity for mandatory court supervision of the trust.

(2) A statement that, unless the terms of trust limit or eliminate such authority, Section 1138.1 of the Probate Code gives the beneficiary and remainderman the right to petition a court to determine important matters relating to the administration of the trust, and a copy of the text of Section 1138.1.

(3) A statement that each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code, is entitled to a statement of the income and principal receipts and disbursements of the trust at least annually and that any other beneficiary or remainderman, upon written request to the trustee, is entitled to such information at least annually.

(4) A statement that the beneficiary or remainderman is entitled to petition a court to settle the accounts and pass upon the acts of the trustee.

(5) The name and location of the superior court in the county in which it is appropriate to file a petition pursuant to Section 1138.1, the name and location of the superior court which had jurisdiction over the administration

of the estate pursuant to Section 301, and a statement that it is appropriate to file a petition pursuant to Section 1138.1 with either court.

The trustee shall file with the court which previously had jurisdiction over the administration of the estate, pursuant to Section 301, proof of service of the notice set forth in this subdivision on or before August 1, 1983, or within seven months after the initial funding of the trust, whichever occurs later.

(b) The trustee shall furnish, at least annually, and at termination of the trust, a statement of the income and principal receipts and disbursements that have occurred since the immediately preceding statement to each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code. The trustee shall also furnish such information to any other beneficiary or remainderman who has made a written request therefor.

(c) Within 90 days after the end of each fiscal year of the trust, the trustee shall furnish the summary of information described in this subdivision to each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code, and, upon written request, to any other beneficiary or remainderman. The summary shall set forth the following:

(1) The cost of each trust asset.

(2) The present value of each asset as of the end of the current fiscal year of the trust.

(3) The total present value of all assets as of the end of the current fiscal year and the immediately preceding fiscal year of the trust.

(4) The net income for the current fiscal year and the immediately preceding fiscal year of the trust.

(5) Trustee compensation for the current fiscal year and the immediately preceding fiscal year of the trust.

The summary shall also state that the recipient may petition a court pursuant to Section 1138.1 to obtain a court review, shall set forth a copy of the text of Section 1138.1, and shall give the name and location of the appropriate court or courts in which to file a petition.

(d) Notwithstanding the provisions of subdivision (a) of Section 1120, with respect to a trust where no trustee is a trust company, as defined in Section 107 of the Financial Code, the trustee may remove the trust from the continuing jurisdiction of the superior court only with the approval of the court which has jurisdiction over the administration of the trust pursuant to Section 1120. Unless the trust is so removed, the trustee is not required to comply with the requirements of subdivisions (a), (b), and (c). To obtain such approval the trustee may file at any time and from time to time, in his or her discretion, a verified petition with the clerk setting forth the trust accounts in detail, reporting his or her acts as trustee, and showing the condition of the trust estate. Unless the petition is filed with the court which has jurisdiction over the administration of the trust pursuant to Section 1120, the trustees shall attach to the petition a certified copy of the decree setting forth all of the trust provisions. Thereupon the clerk shall set the petition for hearing by the court. Notice of the hearing shall be given, along with a copy of the petition, at least 30 days before the hearing to all those persons who are entitled to receive the notice required by subdivision (a). At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or grant the petition upon such conditions as the court in its discretion deems proper. In the event the petition is granted, the trustee shall send the notice and file the proof of service required by subdivision (a) within six months and seven months, respectively, from the date the petition is granted. Such notice shall have attached to it a copy of the order of the court granting the petition. If no such

petition is granted, the trust shall continue to be administered under subdivisions (b) and (c) of Section 1120 as if the testator had provided in the will that the superior court shall not lose jurisdiction of the estate by final distribution and subdivisions (b) and (c) of this section shall not apply to the trust. Nothing provided in this subdivision shall be interpreted to require any trustee to file a petition authorized by this subdivision.

(e) When a beneficiary or remainderman is a minor, ward or conservatee, any notice, statement, or summary required to be sent to the beneficiary or remainderman by this section shall be sent to the parent, guardian, or conservator, as the case may be, of the beneficiary or remainderman. In addition, if the trustee, at the time the notice required by subdivision (a) is sent, has actual knowledge that a beneficiary or remainderman who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by subdivision (a) to both that individual and the beneficiary or remainderman and, upon the written request of either of them, shall also send the statements and summaries required by subdivisions (b) and (c) to both of them.

(f) Where the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, upon the vesting of any charitable interest created by the trust the trustee shall thereafter furnish to the Attorney General the statements and summaries required by subdivisions (b) and (c) without the necessity of any written request. A charitable interest is deemed to be vested within the meaning of this subdivision as of the time when it is first ascertainable that income or corpus is, or in the future will be, paid to a charity or applied for a charitable purpose. Notwithstanding the provisions of Section 1138, the Attorney General may petition the court to settle the account and pass upon the acts of the trustee as provided in Section 1138.1.

(g) If a trust company, as defined in Section 107 of the Financial Code, is appointed as a successor trustee of a trust which, at the time of the appointment, is subject to the continuing jurisdiction of the superior court because it was not removed pursuant to the provisions of subdivision (d), the successor trustee shall send the notice and proof of service required by subdivision (a) within six months and seven months from the date of appointment, respectively. After a trust is no longer subject to the continuing jurisdiction of the superior court, whether by operation of law or by removal pursuant to subdivision (d), neither a change in trustees nor any other event shall cause the trust to be subject to the provisions of Sections 1120 to 1133, inclusive.

Comment. The substance of former Section 1120.1a is continued in Sections 4180-4186 (removal of trusts from continuing court supervision) and 4001 (clerk to set for hearing). See also Section 4341 (duty to account annually). References to remaindermen are not continued since they are unnecessary in light of the definition of "beneficiary" in Section 29.

§ 1120.2 (repealed). Powers of trustee

On petition of the trustee, made at any time, or on petition of the executor or administrator included in a petition for preliminary or final distribution, where after hearing it appears to be necessary or desirable in order to carry out the purposes of the trust that the trustee be given powers not expressly contained in the will or otherwise conferred by law, the court may in its discretion confer upon the trustee any or all of the following powers when it appears to the court that such powers are not inconsistent with the provisions or purposes of the trust; such powers conferred may be of a continuing nature or may be exercised only in specific instances, as the court may determine:

- (1) To manage, control, sell, convey, divide, and to sell upon deferred payments; to lease for terms within or extending beyond the duration of the trust for any purpose including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases.
- (2) To retain property, including stock of the trustee, and invest and reinvest as provided by law from time to time existing, including investments in any common trust fund now or hereafter established by the trustee.
- (3) To borrow; to place, replace, renew or extend any encumbrance upon any trust property.
- (4) To participate in voting trusts, pooling agreements, foreclosures, reorganization, consolidation, mergers, and liquidations and in connection therewith, to deposit securities with and transfer title and delegate discretions to any protective or other committee as the trustee may deem advisable.
- (5) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to exchange, partition, change the character of, or abandon a trust asset or any interest therein.
- (6) To make ordinary or extraordinary repairs or alterations in buildings or other trust property, to demolish any improvements, to raze existing or erect new party walls or buildings.
- (7) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration.
- (8) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset.
- (9) To vote a security, in person or by general or limited proxy.
- (10) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.
- (11) To sell or exercise stock subscription or conversion rights.
- (12) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the security so held.

(13) To insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons.

(14) To advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary.

(15) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible; to institute, compromise and defend actions and proceedings.

(16) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust.

(17) To continue or participate in any business or other enterprise and to effect incorporation, dissolution, or other change in the form of organization of the business or enterprise.

(18) To exercise any other power or powers which to the court appear necessary or desirable.

Except as specifically provided in the will, the provisions of this section apply to any will executed before or after the effective date of this section and to any trust asset acquired by the trustee of the trust created by such will, before or after the effective date of this section.

If any provision of this section or the application thereof to any person, property or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

Note. The disposition of Section 1120.2 is explained in Exhibit 1 attached to Memorandum 84-22.

§ 1120.5 (repealed). Papers to accompany special notice

When any beneficiary under a trust shall have made a request for special notice pursuant to Section 1202, a copy of the petition and a copy of the account and report provided for in Section 1120 shall be attached to the notice of hearing required to be mailed by the trustee to such beneficiary pursuant to Section 1120.

Comment. Former Section 1120.5 is not continued.

§ 1120.6 (repealed). Uneconomically low principal

(a) If upon petition of the trustee or any beneficiary of a trust, the superior court shall at any time determine that the fair market value of the principal of a trust has become so low, in relation to the costs of administration thereof, that continuance of the trust pursuant to its existing terms will defeat or substantially impair the accomplishment of the purposes of the trust, the court may, in its discretion in a

manner which conforms as nearly as possible to the intention of the trustor, order that the trustee be changed, that the terms of the trust be modified, or that the trust be terminated, in whole or in part.

(b) If the court orders termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner which conforms as nearly as possible to the intention of the trustor; and may make such other and further orders as it deems necessary or appropriate to protect the interests of the beneficiaries.

(c) Nothing in this section shall limit any power of the court to permit modification or termination of any trust, as such power existed before the adoption of this section.

(d) The existence of a spendthrift or similar protective provision in the trust shall not make this section inapplicable to such trust.

Comment. The substance of former Section 1120.6 is continued in Section ____.

§ 1121 (repealed). Accounting

Upon application of any beneficiary of the trust, or the guardian or conservator of a beneficiary, the court, in its discretion, or a judge thereof, may order the trustee, after citation, to render his account; and such application shall not be denied where no account has been rendered to the court within six months.

Comment. The first part of former Section 1121 is superseded by Section 4630(b)(7) (petition to compel accounting). The remainder of former Section 1121 is superseded by Section 4340 (trustee's duty to account).

Note. Draft Section 4340 is attached to Memorandum 84-21.

§ 1122 (repealed). Compensation of trustee

If the will contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. Upon proper showing, the court may in the decree of distribution or thereafter fix or allow greater compensation than could be allowed under the provisions of the will (1) where the duties of the trustee are substantially greater than those contemplated by the testator at the time of the signing of the will, or (2) where the compensation in accordance with the provisions in the will would be inequitable or unreasonably low, or (3) in other extraordinary circumstances calling for equitable relief. If the will does not specify a trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances and the court may, in the decree of distribution or thereafter, determine such reasonable compensation and, in its discretion, fix or allow a periodic compensation for the trustee or trustees, to continue as long as it may deem proper. Unless the will provides or the trustees agree otherwise, if there are two or more trustees, the compensation shall be apportioned among the trustees according to the services rendered by them respectively. On settlement of each account the court shall allow the testamentary trustee his proper expenses and compensation for services as provided herein.

Comment. The substance of the first and second sentences of former Section 1122 are continued in Section 4500. The reference to the decree of distribution is not continued. See Section 4602 (proper court). The substance of the first part of the third sentence is continued in Section 4501 (compensation where trust silent). The remainder of the third sentence is superseded by Section 4630(b)(9) (petition to fix compensation). The substance of the fourth sentence is continued in Section 4502 (compensation of cotrustees). The last sentence is superseded by Section 4630(b)(5) (petition for approval of accounts). See also Section 4470 (trustee's power to pay compensation and expenses).

Note. Draft Sections 4500-4502 are attached to Memorandum 84-25

§ 1123 (repealed). Conclusiveness of decree

A decree rendered under the provisions of this chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being.

Comment. Former Section 1123 is superseded by Section 4614(b).

§ 1123.5 (repealed). Removal of trustee

The court in which the administration is pending or, after final distribution, the court sitting in probate which has jurisdiction over a testamentary trust shall have power to remove a trustee of a testamentary trust, whether or not any property has been distributed to him or her, who has violated or is unfit to execute the trust or has acquired any interest or become charged with any duty adverse to the interest of any beneficiary in the subject of the trust. The court may remove one or all of the cotrustees of a testamentary trust and appoint new trustees where the court determines that hostility, ill feeling, or continued lack of cooperation among and between cotrustees has impaired the proper administration of the trust. The proceeding may be initiated by the court upon its own motion or by verified petition of a beneficiary of, or any other person interested in, the trust, including any person in being who shall or may participate in the corpus or income of the trust. The clerk shall set the matter for hearing. The trustee whose removal is sought shall be personally served with a copy of the motion or petition and with notice of the time and place of the hearing thereon, at least 10 days before the hearing, provided, that if the trustee is not a resident of this state, or has absconded or concealed himself or herself from the state, the court may fix the manner of giving notice to him or her by mail, publication or otherwise, as the court may determine, and the court may proceed upon the notice as if the trustee had been personally served. In addition, the petitioner, or the court when acting upon its own motion, shall cause a copy of the petition or motion and of the notice of hearing to be mailed to the personal representative, if any part of the estate remains to be distributed to the trustee, and to each cotrustee and to the beneficiaries, including therein all persons in being who shall or may participate in the corpus or income of the trust, at their last known or other addresses, as provided in Section 1200, whether any of the persons to whom notice is to be given have requested special notice or given notice of appearance, or to be personally served upon those persons.

Comment. Former Section 1123.5 is superseded by Section 4584 (removal of trustee by court). See also Section 4600 et seq. (judicial administration of trusts).

Note. Draft Section 4584 is attached to Memorandum 84-26.

§ 1123.6 (repealed). Custody of assets pending hearing

The court, whenever it appears from the verified petition of a beneficiary of the trust or other person interested in the trust, or from facts coming to its attention that the assets of the trust or the interests of a beneficiary may suffer loss or injury during the time required for hearing and decision by the trial court under Section 1123.5 and appellate review, if any, may compel the trustee whose removal is sought to surrender any assets of the trust in his possession or subject to his control to a custodian designated by the court or to a cotrustee and may suspend the powers of the trustee to such extent as the court deems necessary.

Comment. The substance of former Section 1123.6 is largely continued in Section 4584(b).

Note. Draft Section 4584 is attached to Memorandum 84-26.

§ 1123.7 (repealed). Exclusive jurisdiction and procedure

The jurisdiction and procedure provided by Sections 1123.5 and 1123.6 shall be exclusive.

Comment. Former Section 1123.7 is superseded by Section 4601.

§ 1124 (repealed). Declination of designated trustee to act

Any person named or designated as a trustee in a will may, at any time before distribution of any of the estate to him, decline to act as such trustee, by a writing filed with the clerk of the court where the estate proceedings are pending and within five days from the filing of said writing, shall mail a copy thereof, postage prepaid, from a post office within this State, addressed to the executor or administrator at his place of residence, if known to the person declining, if not, at the county seat of the county where the proceedings are pending.

Comment. Former Section 1124 is superseded by Section 4581.

Note. Draft Section 4581 is attached to Memorandum 84-26.

§ 1125 (repealed). Filling vacancies before distribution

The court in which the administration is pending shall have power, at any time before final distribution, to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such declination, removal, or otherwise, if such appointment is necessary to carry out the trust. Such appoint-

ment may be made by the court upon the written application of any person interested in the trust, filed in the probate proceedings, and shall be made only after notice to all parties interested in the trust, given as required by Section 328 upon a petition for the probate of a will.

Comment. Former Section 1125 is superseded by Sections 4571 (court appointment of trustee) and 4630(a), (b)(10) (petition to appoint trustee).

Note. Draft Section 4571 is attached to Memorandum 84-26.

§ 1125.1 (repealed). Petition of resignation of trustee

Any person named or designated as trustee in a will or any successor trustee, may, at any time after the distribution of any of the estate to him, file with the court a petition tendering his resignation as such trustee and setting forth the names and addresses of all living beneficiaries known to said resigning trustee. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the petitioner and the time when the petition will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause a similar notice to be mailed, postage prepaid, to the beneficiaries named in the petition, at least ten days before the hearing, addressed to them at their respective post office addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending. The court shall accept such resignation, making any order which may be necessary for the preservation of the estate. The liability of the said resigning trustee or of the sureties on his bond shall not in any manner be discharged, released, or affected by such resignation, but shall continue until the said trustee has delivered up all of the estate to the person whom the court shall appoint to receive the same.

Comment. The first paragraph of former Section 1125.1 is superseded by Section 4581 (resignation of trustee). See also Section 4630(b)(11) (petition to accept resignation). The substance of the second paragraph is continued in Section 4582 (liability of trustee).

Note. Draft Sections 4581-4582 are attached to Memorandum 84-26.

§ 1126 (repealed). Filling vacancies after distribution

If after distribution a trustee of a testamentary trust dies, resigns, fails or declines to act, cannot be identified, or is for any reason incapable of acting, or is removed or a vacancy in the trusteeship is otherwise created or exists, the court which has jurisdiction over the trust shall have the power to declare a vacancy and appoint a trustee to fill the vacancy, upon the petition of anyone interested in the trust estate and notice given for the period and in the manner required by Section 1200 of this code. The petitioner shall cause notice of the hearing to be mailed to the beneficiaries and to any trustee as provided in said Section 1200, whether they have requested special notice or given notice of appearance or not.

Comment. Former Section 1126 is superseded by Sections 4571 (court appointment of trustee) and 4630(a), (b)(10) (petition to appoint trustee).

Note. Draft Section 4571 is attached to Memorandum 84-26

§ 1127 (repealed). Trustee's bond

Except as provided in Section 1127.5, the person appointed under Section 1125 or Section 1126 of this code, before acting as trustee, shall give a bond such as is required of a person appointed administrator. He shall be allowed the cost of such bond to the extent provided by Section 541.5.

Comment. Former Section 1127 is superseded by Section 4551.

Note. Draft Section 4551 is attached to Memorandum 84-26.

§ 1127.5 (repealed). Bond not required of certain charitable corporation trustees

Upon the petition of a nonprofit corporation named or designed as trustee in a will or acting as a successor trustee thereunder within the scope of its own charitable purposes and trust, the court may name as substitute or successor trustee a charitable corporation of which the nonprofit corporation is the sole member without requiring any bond not theretofore required of the nonprofit corporation.

Comment. Former Section 1127.5 is superseded by Section 4551.

Note. Draft Section 4551 is attached to Memorandum 84-26.

§ 1128 (repealed). Transfer of trust proceedings to another county

Where, in accordance with the provisions of section 1120 of this code, jurisdiction is retained of any trust created by will, the superior court in which such proceeding is pending, may, at any time after final distribution, on petition of the trustee, or of any other interested party, make an order transferring further proceedings in reference to such trust, to the superior court of any other county of this State. To obtain such transfer, the person applying therefor shall file in the court in which the proceeding is pending, a verified petition which shall set forth the following:

1. The name of the county to which it is sought to transfer proceedings;
2. The names, ages and places of residence of all trustees and of all persons who are interested as beneficiaries in the trust, so far as the same are known to petitioner;
3. A brief description of the character, condition, value and location of the property included in the trust estate;
4. A brief statement of the reasons for transfer.

Comment. Former Section 1128 is not continued since the law no longer provides for retention of jurisdiction over testamentary trusts. See the Comment to former Section 1120.

§ 1129 (repealed). Hearing on transfer of trust proceedings to another county

Upon the filing of such petition, the clerk shall set the same for hearing upon a date not less than 10, nor more than 30 days thereafter, and shall cause notice thereof to be given for the time and in the manner specified in Section 1200 of this code. Petitioner shall, at least 10 days prior to the time set for hearing, cause to be mailed to each of the persons named in such petition, at their respective places of residence as therein set forth, a copy of the notice of hearing. Any person interested in the trust, either as trustee or as beneficiary, may appear and file written grounds in opposition thereto. If, after hearing, it appears to the court that the transfer of proceedings to the court designated in the petition or to the superior court of any other county in this State, will be for the best interests of the estate, or that economical and convenient administration of the trust will be facilitated thereby, the court shall make an order transferring proceedings to such court. Thereupon the clerk shall certify to the clerk of the court to which the proceeding is transferred, a copy of the order of transfer, together with copies of the will or other instrument creating the trust, the decree of distribution, and such other documents or matters of record therein as the court may by its order determine to be necessary to define the powers and obligations of the trustee, or otherwise necessary in connection with the further administration of the trust. The court to which the proceeding is transferred may from time to time require by its order, the filing of certified copies of such additional papers or matters of record from the court of probate, as may be required.

Upon the filing of a certified copy of the order of transfer, together with supporting documents, the court to which the proceeding is transferred, shall have with respect to such trust, the same jurisdiction as the court of probate would have retained under the provisions of Section 1120 of this code, but for the transfer.

Except as otherwise specified herein, practice on the presentation and hearing of such petition and of all other matters in relation thereto, shall be in accordance with the provisions of Division 3 of this code, so far as the same may be applicable.

Comment. Former Section 1129 is not continued. See the Comment to former Section 1128.

§ 1130 (repealed). Vouchers; withdrawal; production; destruction or delivery to trustee or attorney

Any voucher which may have been filed in support of the account of a trustee may be withdrawn on leaving a certified copy on file, but must be produced on demand, unless permanently withdrawn with the permission of the court. Five years from the date of settlement of the account in support of which a voucher was filed the clerk of the court may destroy the voucher or deliver it to the trustee or to his attorney.

Comment. Former Section 1130 relating to vouchers supporting accountings made by trustees of trusts subject to continuing judicial supervision is not continued.

§ 1130.1 (repealed). Certificate of appointment as trustee

Upon application of the trustee or trustees of a trust created by a will, the clerk shall issue a certificate that the trustee or trustees are duly appointed and acting trustee or trustees under the will.

Comment. Former Section 1130.1 is continued in Section 4550. See also Section 10 (singular includes plural).

Note. Draft Section 4550 is attached to Memorandum 84-26.

§ 1132 (repealed). Transfer of testamentary trust to another jurisdiction

Where, under Section 1120, jurisdiction is retained of any trust created by the will of a decedent, the court may order that the place of administration or assets of the trust be transferred to another jurisdiction, pursuant to the procedure provided by Article 3 (commencing with Section 1139) of this chapter.

Comment. Former Section 1132 is superseded by Section 4651 (transfer of trust from California). See also Section 4650 (application of transfer provisions).

Note. Draft Sections 4650-4651 are attached to Memorandum 84-30.

§ 1133 (repealed). Combination of assets and administration of trusts as one trust

When a trustee who has already been appointed by a will or appointed by the court to execute a trust created by a will is appointed by another will or appointed by the court to execute a trust created by another will, and the provisions and terms of the decree establishing each trust are substantially identical, the court may upon the petition of the trustee and without notice order the trustee to combine the assets and administer them as a single trust, if it determines that administration as a single trust will (1) be consistent with the intent of the trustor, and (2) facilitate administration of the trust without defeating or impairing the interests of the beneficiaries.

Comment. The substance of former Section 1133 is continued in Section 4304(b).

Note. Draft Section 4304 is attached to Memorandum 84-21.

Article 2.5. Inter Vivos and Other Trusts

§ 1138 (repealed). "Trust" defined

(a) As used in this article, "trust" means a written voluntary express trust, with additions thereto, whether created by will or other than by will which is entirely administered or to be entirely administered in this state.

(b) As used in this article, "trust" does not mean a trust subject to court supervision under Article 1 (commencing with Section 1120) of this chapter, a Totten trust, a business trust which is taxed as a

partnership or corporation, an investment trust subject to regulation under the laws of this state or any other jurisdiction, a common trust fund, a voting trust, a deed of trust, a transfer in trust for purpose of suit or enforcement of a claim or right, a trust for the primary purpose of paying debts, dividends, interest, salaries, wages, pensions, or employee benefits of any kind, an arrangement under which a person is a nominee or escrow holder for another, a trust subject to supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code during the period when no private beneficiary or remainderman has or may claim an interest therein, nor a trust declared exempt from supervision under Section 12583 of the Government Code.

Comment. The substance of former Section 1138 is generally continued in Section 82 ("trust" defined). The reference in subdivision (a) of former Section 1138 to "voluntary" trusts is not continued because it is unnecessary. See the Comment to former Civil Code § 2215. The language in subdivision (a) concerning trusts "entirely administered or to be entirely administered in this state" is superseded by the provision in Section 4600 concerning the principal place of administration of the trust.

The substance of subdivision (b) of former Section 1138 is continued in Section 82 except as noted. The former exclusion of trusts subject to court supervision is superseded by Sections 4180-4186. See the Comment to former Section 1120. The former exclusion of business trusts taxed as partnerships or corporations is continued by the reference in Section 82 to business trusts providing for certificates to be issued to beneficiaries. The former exclusion of investment trusts subject to regulation under the laws of this state or any other jurisdiction is included in the reference in Section 82 to business trusts. The former exclusion of deeds of trust and transfers in trust for the purpose of suit or enforcement of a claim or right is continued in Section 82 in the reference to security arrangements. The former exclusion of certain charitable trusts and trusts described in Government Code Section 12583 is not continued. See Section 82 ("trust" defined).

§ 1138.1 (repealed). Grounds for petition by trustee

(a) A trustee, beneficiary, or remainderman may petition the superior court for any of the following purposes:

- (1) Determining to whom the property shall pass or be delivered upon final or partial termination of the trust, to the extent such determination is not concluded by the trust instrument.
- (2) Settling the accounts and passing upon the acts of the trustee.
- (3) Authorizing the trustee to accept additions to the trust when the trust instrument does not prohibit such additions.
- (4) Instructing the trustee.
- (5) Compelling the trustee to submit his accounts and report his acts as trustee to a beneficiary or remainderman when it appears that the trustee has failed to submit an accounting and report within 60 days after written request of a beneficiary or remainderman and no accounting and report has been made within six months preceding such request.

(6) Granting to the trustee powers not expressly contained in the trust instrument to the extent provided in Section 1120.2.

(7) Fixing, directing, or allowing payment of compensation to the trustee in accordance with Section 2274 of the Civil Code.

(8) Appointing a trustee.

(9) Accepting the resignation of a trustee.

(10) Removing a trustee.

(11) Authorizing or directing removal of the trusts or assets of the trust to another jurisdiction pursuant to the procedure provided in Article 3 (commencing with Section 1139) Chapter 19, Division 3.

(12) Directing the relief provided in Section 2279.1 of the Civil Code.

(13) Amending or conforming the trust instrument in the manner required to qualify the decedent's estate for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(b) The terms of a trust subject to this article may expressly or by necessary implication limit or eliminate the authority of any trustee, beneficiary, remainderman or other person to petition the court under this article for any one or more of the purposes enumerated in subdivision (a).

Comment. The substance of subdivision (a) of former Section 1138.1 is continued in Section 4630 with the following changes: Paragraph (3) is not continued since Section 4424 permits additions to trusts without the need for court approval. Paragraph (6) is superseded by Section 4620(b)(5) which is drafted in recognition of the automatic powers available under Sections 4420-4482. See Section 4401 (court order relieving trustee of restrictions); see also Section 4341 (duty to account annually). Subdivision (b) is not continued; the trust instrument may not limit the availability of proceedings under Section 4630.

Note. Draft Sections 4420-4482 are attached to Memorandum 84-22. Draft Sections 4620 and 4621 are attached to Memorandum 84-29.

§ 1138.2 (repealed). Orders and decrees of court

The court may make all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition.

Comment. Former Section 1138.2 is continued in Section 4634.

§ 1138.3 (repealed). Venue

(a) Proceedings under this article shall be commenced in the superior court of the county in which is located the principal place of administration of the trust. As used in this section, the "principal place of administration of the trust" is the trustee's usual place of business where the day-to-day records

pertaining to the trust are kept or the trustee's residence if he has no such place of business. In the case of cotrustees, the principal place of administration is the usual place of business where such records are kept, or, if none, the usual place of business or residence of any of the cotrustees as agreed upon by them, or, if none, the county in which any trustee resides or maintains a place of business.

(b) Proceedings under this article with respect to a trust created by a will subject to Section 1120.1a, which is not subject to the continuing jurisdiction of the superior court, shall be commenced either in the superior court described in subdivision (a) or in the superior court which has jurisdiction over the administration of the estate pursuant to Section 301.

Comment. The substance of the first sentence of subdivision (a) of former Section 1138.3 is continued in Section 4602(a) (venue). See also Section 4601(a) (jurisdiction in superior court). The substance of the second and third sentences is continued in Section 4600. The substance of subdivision (b) of former Section 1138.3 is continued in Section 4602(a).

§ 1138.4 (repealed). Petition

Each proceeding under this article shall be commenced by filing a verified petition which shall state facts showing that the petition is authorized under this article and the terms of the trust. No filing fee shall be required of any petitioner in a proceeding commenced pursuant to this article with respect to a trust created by a will subject to Section 1120.1a which is not subject to the continuing jurisdiction of the superior court.

Comment. The substance of the first sentence of former Section 1138.4 is continued in Section 4631 (commencement of proceeding). The second sentence is not continued.

§ 1138.5 (repealed). Dismissal of petition

The court may dismiss a petition when it appears:

(a) That the proceeding is not reasonably necessary for the protection of the interests of a trustee or for the protection of the interests of beneficiaries or remaindermen; or

(b) That nondisclosure of the terms, assets, management, and administration of the trust is in the best interests of the objects of the trust.

Comment. The substance of subdivision (a) of former Section 1138.5 is continued in Section 4632. Subdivision (b) is not continued.

§ 1138.6 (repealed). Notice and hearing

(a) Upon the filing of a petition provided for in this article, the clerk shall set the petition for hearing.

At least 30 days before the time set for the hearing of the petition, the petitioner shall cause notice of the time and place of hearing thereof to be mailed to the trustee of the trust when he or she is not the petitioner, to any cotrustee not petitioning, and to all beneficiaries and remaindermen of the trust, including all persons in being who may participate in the corpus or income of the trust, addressed to them at their respective offices or places of residence, if known, and if not known such notice shall be given as the court

may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

When a cotrustee not petitioning, a beneficiary, or a remainderman, in person or by counsel, has served and filed a notice of appearance directed to the petitioner or his or her counsel in connection with the particular petition and proceeding, or a written request for a copy of the petition, and given an address to which notices or a copy may be sent or delivered, the petitioner shall cause a copy of the petition to be sent by mail to the cotrustee or person or counsel within five days after service of notice of appearance or receipt of the request.

Personal delivery is the equivalent of mailing.

Proof of the giving of notice and of mailing or personal delivery of a copy of the petition shall be made at the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, shall be conclusive upon all persons.

(b) Proceedings under this article shall be governed, whenever possible, by the provisions of this article, and when the provisions of this article do not appear applicable, the provisions of Division 3 (commencing with Section 300) shall apply.

(c) The court for good cause may shorten the time required for performance of any act required by this section.

(d) Notice of any petition filed pursuant to paragraph (13) of subdivision (a) of Section 1138.1 shall be given to the Attorney General.

Comment. The first paragraph of subdivision (a) of former Section 1138.6 is continued in Section 4001 (clerk to set petition for hearing). The substance of the second paragraph is continued in Sections 4633(a) (notice of hearing on petition) and 4612(c) (notice in manner directed by court). The reference to remaindermen is not continued because it is unnecessary in light of the definition of "beneficiary" in Section 24. The substance of the third paragraph is continued in Section 4633(b). The fourth paragraph is continued in Section 4613 (personal delivery). The fifth paragraph is superseded by Section 4614 (proof of giving notice).

Subdivision (b) is not continued. Trust proceedings are governed by Division 4.5 (commencing with Section 4000). The substance of subdivision (c) is continued in Section 4616. The substance of subdivision (d) is continued in Section 4633(c).

§ 1138.7 (repealed). Appointment of guardian ad litem; threatened exercise of power not conferred upon trustee

(a) At any stage of a proceeding under this article the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. Where not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.

(b) When it appears from the petition that the trustee seeks or is to be given instructions to exercise a power not conferred upon him, the petition shall set forth the particulars of, and the necessity for, the action sought to be taken. In addition to the notice required by Section 1138.6, when the petition relates to the exercise of a power

not conferred or where the petition relates to determining to whom the property shall pass or be delivered upon final or partial termination of the trust, a copy of the petition shall be attached to, and mailed with, copies of the notice, and, at least 10 days before the time set for the hearing of the petition, the court or judge shall appoint a suitable person or persons who shall appear and act as guardian ad litem of any person or persons of a designated class who are not ascertained or in being or who may become beneficiaries or may participate in the trust.

(c) Sections 373 and 373.5 of the Code of Civil Procedure shall not apply to the appointment of a guardian ad litem under the provisions of this article.

Comment. The substance of subdivisions (a) and (c) of former Section 1138.7 is continued in Section 4002 (appointment of guardian ad litem). Subdivision (b) is superseded by Sections 4631 (petition) and 4633 (notice). See also Section 4610-4618 (notice provisions).

§ 1138.8 (repealed). Resignation of trustee or cotrustee; appointment of successor trustee

Unless otherwise expressly provided in the trust instrument a trustee or cotrustee may resign at any time. Such resignation and the appointment of a successor trustee shall be effected as provided in the trust instrument. If the trust instrument is silent a trustee may file with a court a petition tendering his resignation as such trustee and the court shall accept such resignation making any order appointing a successor trustee and other order which may be necessary for the preservation of the estate. The liability of the resigning trustee or the sureties on his bond, if any, shall not be discharged, released, or affected in any manner by the resignation, but shall continue until the trustee has delivered all of the estate to the person whom the court shall appoint to receive it.

Comment. The substance of the first three sentences of former Section 1138.8 is continued in Section 4581 (resignation of trustee). The substance of the last sentence is continued in Section 4582 (liability of resigning trustee).

Note. Draft Sections 4581-4582 are attached to Memorandum 84-26.

§ 1138.9 (repealed). Appointment of successor trustee

If a trustee of a trust subject to this article dies, resigns, fails or declines to act, cannot be identified, is incapable of acting for any reason, or is removed, or a vacancy in the trusteeship is otherwise created or exists, and the trust instrument does not provide a method for appointing a successor trustee, the court shall have the power to appoint a trustee to fill the vacancy upon the petition of the trustee or anyone interested in the trust estate.

Comment. The substance of former Section 1138.9 is continued in Section 4571.

Note. Draft Section 4571 is attached to Memorandum 84-26.

§ 1138.10 (repealed). Appeal

An appeal may be taken from any final order or decree made pursuant to paragraph (1), (2), (4), (6), (7), (8), (10), or (11) of subdivision (a) of Section 1138.1, or from an order dismissing the petition or denying a motion to dismiss under Section 1138.5.

Comment. The substance of former Section 1138.10 is continued in Section 4635 (appeal).

§ 1138.11 (repealed). Cumulative and nonexclusive remedies

The remedies provided under this article are cumulative and nonexclusive.

Comment. Former Section 1138.11 is continued in Section 4636.

§ 1138.12 (repealed). Legislative intent

It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article proceed expeditiously and free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law.

Comment. Former Section 1138.12 is not continued because it is unnecessary.

§ 1138.13 (repealed). Applicability of article

This article shall apply to all trusts created prior to, or on, or after the operative date of this article. However, this article shall not apply to any trust the terms and provisions of which expressly or by necessary implication make this article inapplicable to such trust.

Comment. The substance of the first sentence of former Section 1138.13 is continued in Section 4151 (transitional provision). The second sentence is not continued. See also Section 82 ("trust" defined).

§ 1138.14 (repealed). Transfer in trust of pecuniary amount

The provisions of Article 3 (commencing with Section 1030) of Chapter 16 shall apply to gifts, whether outright or in trust, made in a trust which is subject to this article and is executed or amended after or before the effective date of this section. However, this section shall not apply to any trust the terms of which expressly or by necessary implication make this section inapplicable to it. For purposes of this section, all references in Article 3 (commencing with Section 1030) of Chapter 16 to a "testator" shall refer to the trustor and all references to a "will" shall refer to a trust which is subject to this article.

Comment. The substance of former Section 1138.14 is continued in Section 4003.

Probate Code §§ 1215-1215.4 (repealed). Notice in trust proceedings

SEC. ____ . Article 1.5 (commencing with Section 1215) of Chapter 22 of Division 3 of the Probate Code is repealed.

Article 1.5. Notice in Trust Proceedings

§ 1215 (repealed). Definitions

As used in this article:

(1) "Notice" means notice of hearing which is to be sent by mail or personally served.

(2) "Trust proceeding" means a judicial proceeding involving a trust provided for by Chapter 19 (commencing with Section 1120) of this division, or Chapter 8 (commencing with Section 6320) of Part 1 of Division 6, including but not limited to proceedings for instructions, for settlement of trustee's accounts or distribution of trust assets upon partial or final termination of the trust.

Comment. Former Section 1215 is superseded by Section 4610.

§ 1215.1 (repealed). Notice in cases involving future interests

Subject to other provisions of this article, it is a sufficient compliance with Sections 1120, 1120.1a, 1123.5, 1125, 1125.1, 1126, 1138.6, 1139.7, and 1139.15, insofar as they require notice to be given to the beneficiaries of, or persons interested in the trust, or to beneficiaries or remaindermen, including all persons in being who shall or may participate in the corpus or income of the trust, to give notice in the cases hereinafter provided, as follows:

(1) When an interest has been limited on any future contingency to persons who shall compose a certain class upon happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceedings.

(2) When an interest has been limited to a living person, and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are, or may be, the distributees, heirs, issue or other kindred of such living person, notice shall be given to such living person.

(3) Except as otherwise provided in subdivision (2) when an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the same interest, or a share of such interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first such event.

Comment. The substance of former Section 1215.1 is continued in Section 4618(a).

§ 1215.2 (repealed). Conflicts of interest in subject matter

Notwithstanding the provisions of Section 1215.1, notice shall be given to persons who would not otherwise be entitled to notice under such section, when a conflict of interest involving the subject matter

of the trust proceeding exists between a person to whom notice is given and a person to whom notice need not be given under Section 1215.1.

Comment. The substance of former Section 1215.2 is continued in Section 4618(b).

§ 1215.3 (repealed). Additional notices; appointment of guardian ad litem

(a) The court, upon its own motion or on request of a person interested in the trust, at any stage of the proceeding may do either or both of the following:

(1) Require that additional notice be given pursuant to Section 1204, and prescribe the form and method of such notice,

(2) Appoint a guardian ad litem to represent the interest of a minor, incapacitated, unborn, or unascertained person, or a person whose identity and address are unknown, or a designated class of persons who are not ascertained or are not in being. When not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(b) For the purposes of this section, a trustee is a person interested in the trust.

Comment. The substance of former Section 1215.3 is continued in Sections 4002 (appointment of guardian ad litem) and 4615(a) (additional notice).

§ 1215.4 (repealed). Effect of article on other notice requirements

Nothing in this article affects requirements for notice to a person who has requested special notice or filed notice of appearance pursuant to Article 1 (commencing with Section 1200) of this chapter, or pursuant to any other statute, or for notice to a particular person or entity, or for appointment of a guardian ad litem pursuant to Section 1120 or Section 1138.7, or for delivery or mailing of a copy of the petition pursuant to Section 1120. Without obtaining a court order therefor, the petitioner or other person required to give notice may cause notice to be given to any person interested in the trust.

Comment. The substance of the first sentence of former Section 1215.4 is continued in Section 4618(c). The substance of the second sentence is continued in Section 4615(b).

Exhibit 4

UNIFORM PROBATE CODE

ARTICLE VII
TRUST ADMINISTRATION

PART 1

TRUST REGISTRATION

Section

- 7-101. [Duty to Register Trusts.]
- 7-102. [Registration Procedures.]
- 7-103. [Effect of Registration.]
- 7-104. [Effect of Failure to Register.]
- 7-105. [Registration, Qualification of Foreign Trustee.]

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

- 7-201. [Court; Exclusive Jurisdiction of Trusts.]
- 7-202. [Trust Proceedings; Venue.]
- 7-203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]
- 7-204. [Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.]
- 7-205. [Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.]
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PART 3

DUTIES AND LIABILITIES OF TRUSTEES

- 7-301. [General Duties Not Limited.]
- 7-302. [Trustee's Standard of Care and Performance.]
- 7-303. [Duty to Inform and Account to Beneficiaries.]
- 7-304. [Duty to Provide Bond.]
- 7-305. [Trustee's Duties; Appropriate Place of Administration; Deviation.]
- 7-306. [Personal Liability of Trustee to Third Parties.]
- 7-307. [Limitations on Proceedings Against Trustees After Final Account.]

GENERAL COMMENT

Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testament-

ary trusts. The most important is that the Court assumed by the Code is a full power court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be re-

leased to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the

special needs of the trust relationship. Proceedings in equity before courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trustee wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.
2. To strengthen the ability of owners to select trustees by eli-

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Art. 7

inating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular court will be accessible to the parties on a permissive basis with-

out subjecting the trust to compulsory, continuing supervision by the court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a court will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

Section 7-101. [Duty to Register Trusts.]

The trustee of a trust having its principal place of administration in this state shall register the trust in the Court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place

of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was con-

cluded, however, that the inclusion of this term, which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

Section 7-102. [Registration Procedures.]

Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument

executed by the trustee and all beneficiaries, filed with the registration in this state.

COMMENT

Additional duties of the clerk register trusts is stated in Section 7-101. of the Court are provided in Section 1-305. The duty to

Section 7-103. [Effect of Registration.]

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the Court in any proceeding under 7-201 of this Code relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the Court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under Section 7-201, provided notice is given pursuant to Section 1-401.

COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Section 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonres-

ident beneficiary's interests in section affords due process and foreign land of chattels, but the represents a worthwhile step for-National Conference believes the ward in trust proceedings.

Section 7-104. [Effect of Failure to Register.]

A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any Court in which the trust could have been registered. In addition, any trustee who, within 30 days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the Court, is ineffective.

COMMENT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

Section 7-105. [Registration, Qualification of Foreign Trustee.]

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign co-trustee is not required to qualify in this state solely because its co-trustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

COMMENT

Section 7-105 deals with non-resident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualifi-

cation statutes by the common use of local nominees or sub-trustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. See 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section 7-201. [Court; Exclusive Jurisdiction of Trusts.]

(a) The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (1) appoint or remove a trustee;
- (2) review trustees' fees and to review and settle interim or final accounts;
- (3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or non-existence of any immunity, power, privilege, duty or right; and
- (4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

COMMENT

Derived in small part from Statutes, (Purdon) 32080.101 et Florida Statutes 1965, Chapters seq. 737 and 87, and Title 20, Penna.

Section 7-202. [Trust Proceedings; Venue.]

Venue for proceedings under Section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under Section 7-201 involving trusts not registered

in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

Section 7-203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]

The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

Section 7-204. [Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.]

The Court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

Section 7-205. [Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.]

On petition of an interested person, after notice to all interested persons, the Court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in

the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

Section 7-206. [Trust Proceedings; Initiation by Notice; Necessary Parties.]

Proceedings under Section 7-201 are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section 7-301. [General Duties Not Limited.]

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

Section 7-302. [Trustee's Standard of Care and Performance.]

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a rea-

sonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See *Estate of Cook*, (Del.Chanc.1934) 20 Del.Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

Section 7-303. [Duty to Inform and Account to Beneficiaries.]

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

- (a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may

represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-103, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request.

This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

Section 7-304. [Duty to Provide Bond.]

A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the Court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the Court may excuse a requirement of

bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the Court of registration or other appropriate Court in amounts and with sureties and liabilities as provided in Sections 3-604 and 3-606 relating to bonds of personal representatives.

COMMENT

See Sections 3-603 and 3-604; 1949, § 390.911(b) [20 Purdon's 60 Okla.Stats.1961, § 175.24 [60 Pa.Stat. § 390.911(b)]]; cf. Tenn. Okl.St. Ann. § 175.24]; Pa.Fid.Act, Code Ann. § 35-113.

Section 7-305. [Trustee's Duties; Appropriate Place of Administration; Deviation.]

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

Section 7-306. [Personal Liability of Trustee to Third Parties.]

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes

of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

Section 7-307. [Limitations on Proceedings Against Trustees After Final Account.]

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of

the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).

COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4
POWERS OF TRUSTEES

GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Penn-

sylvania, Virginia and Washington have comprehensive legislation which differ in various respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.

EXHIBIT 5

Staff Draft of Miscellaneous General Provisions

Probate Code §§ 4000-4003

38035

DIVISION 4.5. TRUSTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. MISCELLANEOUS PROVISIONS

§ 4000. Judicial Council to prescribe forms

4000. The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this division. Any such form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 4000 is new and is the same as Section 1456 (forms under guardianship-conservatorship statute).

35062

§ 4001. Clerk to set matters for hearing

4001. When a petition which requires a hearing is filed with the court clerk pursuant to this division, the clerk shall set the matter for hearing.

Comment. Section 4001 continues parts of former Sections 1120(a), 1120.1a(d), 1138.6(a), 1139.3, and 1139.15. Section 4001 is comparable to Section 1451 (guardianship-conservatorship statute).

Note. This section might be more logically located with the judicial administration provisions when the comprehensive draft is put together.

35084

§ 4002. Appointment of guardian ad litem

4002. (a) The court may, on its own motion or on request of a trustee or other person interested in a trust, appoint a guardian ad litem at any stage of a proceeding concerning a trust. If the court determines that representation of the interest otherwise would be inadequate, a guardian ad litem may be appointed to represent the interest of any of the following:

- (1) A minor.
- (2) An incapacitated person.

- (3) An unborn person.
 - (4) An unascertained person.
 - (5) A person whose identity or address is unknown.
 - (6) A designated class of persons who are not ascertained or are not in being.
- (b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.
- (c) Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 4002 continues the substance of paragraph (2) of subdivision (a) and subdivision (b) of former Section 1215.3 and the substance of subdivision (a) of former Section 1138.7, and supersedes part of the last paragraph of subdivision (b) of former Section 1120. Subdivision (c) continues the substance of subdivision (c) of former Section 1138.7 and the last sentence of subdivision (b) of former Section 1120.

Note. This section might be more logically located with the judicial administration provisions when the comprehensive draft is put together.

100/932

§ 4003. Law applicable to marital deduction gifts in trust

4003. (a) Except as provided in subdivision (b), the provisions of Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 apply to gifts, whether outright or in trust, made in a trust which is subject to this division.

(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.

(c) For purposes of this section, references in Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 to a "testator" refer to the trustor and references to a "will" refer to a trust that is subject to this division.

Comment. Section 4003 continues the substance of former Probate Code Section 1138.14 and supersedes former Civil Code Section 2264.